No. 451.

October Term, 1901.

Supreme Court of the United States.

Filed Jan. 20, 1902.

JOSEPH J. MARTIN, ALFRED M. FULLER AND THOMAS B. SCHRIVER, COPARTNERS, TRADING AS MARTIN, FULLER AND COMPANY,
Petitioners,

v.

THE STEAMSHIP "SOUTHWARK,"
Respondent.

In re Petition of Martin et al. for a Writ of Certiorari to issue to the Circuit Court of Appeals for the Third Circuit, in the above entitled action.

Brief on Behalf of Petitioners.

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IN THE

Supreme Court of the United States.

MARTIN, FULLER & CO.,
Libellants-Appellants.

v.

STEAMSHIP "SOUTHWARK,"
Respondent-Appellee.

In the Matter of the Petition of Martin, et al., for a Writ of Certiorari directed to the Circuit Court of Appeals for the Third Circuit.

A writ of *certiorari* is prayed for the following reasons:

1. Because this case involves a bill of lading for the carriage of fresh meat, a comparatively new business, but of great volume, and it is desirable that there should be an authoritative decision of this Court, determining the duties and obligations of carriers of such cargoes, and especially as to the application of the Harter act thereto.

2. Because the decision of the Courts below that "the dressed meat clause" in the bill of lading wiped out all warranty of the initial fitness of the ship to receive the cargo and of the refrigerating machinery to preserve it, is in direct conflict with the provisions

*of the Harter act "that it shall not be lawful to insert in any bill of lading * * * any agreement whereby the obligations of the owner of said vessel to exercise due diligence, properly equip, man and provision said vessel * * * shall in anywise be lessened, weakened or avoided."*

3. That if the Courts below meant that the Harter act did not apply to a contract to carry fresh meat, that decision is opposed to the language of the act itself, which governs all provisions of a bill of lading, and is also opposed to the decision of the Court of Appeals of the Second Circuit, in the Prussia, 93 Fed., 837, holding that the Harter act is applicable to bills of lading issued for fresh meat.

4. Because the decision of the Courts below that the burden was upon the cargo owner to prove that the loss occurred through the negligence of the ship owner or his servants is opposed to the law as repeatedly stated by this Court and most recently in International Navigation Company v. Farr & Bailey Mfg. Co., 181 U. S., 218, where the law is declared that the burden is upon the ship owner to prove that he has exercised due diligence to make the ship in all respects fit to carry the cargo.

5. Because the decision of the Courts below that mere superficial observation of machinery in motion, by one who had no duty of inspection, and who did not discover its patent unfit condition, was a proper inspection, is opposed to the law as declared by this Court in the Edwin I. Morrison, 153 U. S., 215, and generally by other Courts that a proper inspection is that which discovers all defects, except latent ones.

THE FACTS.

The statement of facts is inserted in the petition because the courts below failed entirely to find the facts as to the real point in the case, that is, the condition of the meat compartment and the refrigerating machinery at the time the meat was received.

The statement was inserted for the information of the Court as to the basis of the suit only, as a careful consideration of the facts is unnecessary upon this motion, which involves the correctness of the principles of law declared by the Court below.

Succinctly stated, the facts necessary for consideration of this petition are, that at the time the cargo of meat was received on board the *Southwark*, in midsummer, the temperature in the meat compartment was abnormally high—(being about 40°) at least eight degrees above the freezing point, instead of below it. The reason of this excessive temperature was most apparent, being the grossly high temperature of the brine circulating around the meat compartment, for the purpose of reducing the temperature of the air in the latter. As it is obvious that the temperature of the compartment must be below the freezing point to preserve the meat (it is usually about 30°) it is equally clear that in order to keep the air at that temperature, the brine must be even lower and is usually maintained at about 20°. But instead of that, the brine temperature was 40°, at least 20° above what it should have been. As brine, when once cooled, retains its temperature for a long time, it is demonstrated that it never was cooled, although the machinery had been working for at least forty-eight hours previous to the receipt

of the cargo and if in proper working order, the temperature of the brine would have been reduced to about 15° during that time.

Although these conditions demonstrated that the refrigerating machinery was not in efficient condition and was not creating a sufficiently low temperature to preserve the meat, yet without the slightest examination of the machinery to ascertain the cause of its manifest inefficiency and unfitness, the libellants' cargo of fresh meat was taken on board and the steamship proceeded on her voyage in hot midsummer weather.

With these existing conditions, the subsequent occurrences could easily have been foreseen. The refrigerating machinery broke down an hour or two after the ship left the dock. Instead of returning, repairs were attempted. When completed and the machinery was again started, a more serious breakdown occurred, and although completed in about two days, the temperature was never reduced to freezing point until the very last day of the voyage and when the meat was taken out the greater part of it was rotten.

ARGUMENT.

The opinion of the Circuit Court of Appeals is principally directed to a discussion as to whether the Judge of the District Court had misconceived the ground of the libellant's action, but it concludes :

> " His opinion which may be found in 104 Federal Reporter 103, sufficiently states the facts and *rightly rules the law.*"

The law, as ruled by the learned Judge of the District Court, was as follows :

> 1. That by reason of the exceptions and exemptions of the "dressed meat clause," in the bill of lading, the steamship was liable only for loss resulting from negligence.
>
> 2. That the burden of proof of negligence was upon the owner of the cargo.
>
> 3. That mere observation of machinery by one upon whom devolved no duty of inspection, was a proper "inspection," although he failed to discover an apparent fact, *i. e.*, that the machinery was not working properly and was not cooling the brine.

I.

The construction of the "dressed meat clause" of the bill of lading.

The bill of lading issued for the meat, recited that it was "received in apparent good order and condition," and provided that it should be delivered at Liverpool, "in like good order and condition." (Record, p. 12) It also contains, *inter alia*,

the following clause, referred to as the "dressed meat clause."

> "It is expressly agreed that the goods shipped hereunder are absolutely at the risk of the owners in every respect, and that the carrier is responsible for no loss, delay or damage thereto however arising, including stowage and all risks of breakdown or injury however caused, either to its refrigerator or its machinery, even though arising from defect existing at or previous to the commencement of the voyage; also that in case of the meat becoming, from any cause in the opinion of the master of the vessel, putrid, dangerous or offensive to the passengers or crew, it may be thrown overboard or otherwise disposed of, without liability to the carrier for consequent loss."

In order to determine the effect of this clause it is necessary to consider the duty which would have been imposed upon the ship in its absence.

Whatever doubt may have formerly existed as to the obligation of a carrier of fresh meat is now removed.

The *Maori King*, 8 Asp. Mar. C., p. 65; L. R. (1895), 2 Q. B. D., 550, is the leading case.

In that case certain carcasses of frozen mutton were shipped on board the steamship at Melbourne, Australia, for carriage to London. Shortly after starting on her voyage, the refrigerating machinery broke down, and although it was repaired at Sydney, the cargo had become so damaged in consequence of the breakdown, that it had to be sold immediately at Sydney at a loss.

The following exceptions in the bill of lading were relied upon as relieving the ship from liability:

> "Steamer shall not be accountable for the condition of goods shipped under this bill of lading, nor for

any loss or damage thereto arising from the failure or breakdown of machinery, insulation or other appliances, nor for detention, nor for the consequences of any act, neglect, default, or error of judgment of the master, officer, engineer, crew, or other persons in the service of the owners nor for any cause whatsoever."

The case was first heard before MATHEW, *J.*, who held that *there was a warranty of the fitness of the refrigerating machinery for the voyage*, from which there was no exemption by the provisions of the bill of lading.

This decision was affirmed upon appeal, by ESHER M. P., KAY and SMITH.

Lord ESHER said in delivering his opinion :

> " I agree with my brother MATHEW in his holding that there was an implied term in the bill of lading *that the refrigerating machinery at the time of shipment was fit to carry frozen meat to Europe on an ordinary voyage made under ordinary circumstances.*"

That is the law of this country, as declared by the Circuit Court of Appeals of the Second Circuit in the *Prussia*, 93 Fed. 837.

That was also a suit to recover for injury to fresh meat, through an accident to refrigerating machinery. It was held that the steamship was not liable, as the break down was due to a latent defect.

WALLACE, *J.*, says in the opinion :

> " It is the duty of the carrier by water, when he offers a vessel for freight, to see that she is in suitable condition to transport her cargo in safety ; and he impliedly warrants that this duty has been fulfilled. And, when he proposes to transport across the Atlantic a cargo of frozen meat, we agree, as adjudged in the

> *Maori King* (1895, 2 Q. B., 550 and *Queensland National Bank* v. *Peninsula and Oriental Steam Navigation Co.* (1898), 1 Q. B., 567, *that he must be taken to stipulate with the shipper, that the vessel is provided with suitable apparatus of requisite efficiency, to enable him to deliver it in proper order.*"

It will be observed therefore, that in the absence of a special contract, the warranty of the refrigerating machinery is identical with and probably included in the warranty of the seaworthiness of the ship itself.

In delivering the opinion in the *Silvia*, 171 U. S. 462, Mr. Justice GRAY says:

> "The test of seaworthiness *is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.* This is the commonly accepted definition of seaworthiness."

Whether the warranty of seaworthiness covers the refrigerating machinery is unimportant, as it must be admitted that in the absence of a special contract, the warranty in both cases is the same, and covers even latent defects.

The Caledonia, 157 U. S. 124.
The Maori King, supra;
The Prussia, supra.

What was the effect of the "dressed meat" clause of the bill of lading upon this warranty of fitness of the machinery?

That clause is undoubtedly invalid in its broad terms, and the Court below has so held, and there is grave question whether it is not in violation of sections 1 and 2 of the Harter act (27 Stat., 445) and should not therefore be excluded entirely.

Assuming, however, that it is a valid limitation to the extent allowed by law, instead of being entirely invalid, what is its effect?

The Circuit Court of Appeals has held that the parties having entered into this agreement, *there was no implied warranty of the fitness of the machinery at all, and that the ship was liable only upon proof of negligence.*

It is said in the opinion of the District Court, which the Court of Appeals adopts, (Rec. 211).

> "The warranty that a ship in this business is fit at the beginning of a voyage to carry dressed meat safely—which was decided to be implied where the bill of lading is silent (the *Maori King*, (1895), 2 Q. B. 550) cannot be implied if the parties have chosen to contract otherwise; and such a contract is clearly expressed by the language now being considered. The burden of proof, therefore, is not upon the carrier, but upon the shipper, and *there must be sufficient evidence of the carrier's negligence before the shippers can be allowed to recover.*"

In the consideration of this clause, it is well to remember the proper rule of construction. In the *Carib Prince*, 170 U. S., at 659 Mr. Justice WHITE says:

> "The rule thus announced in *The Caledonia*, but expressed the doctrine stated by Lord SELBORNE in *Steele* v. *State Line S. S. Co.*, L. R. 3 App. Cases, 72, that the exceptions in a bill of lading ought, if in reason it be possible to do so, to receive a construction *not nullifying and destroying the implied obligation of the ship owner to provide a ship proper for the performance of the duty which he has undertaken.*"

It is submitted that the findings of both of the courts below, that the steamship was liable only upon proof of negligence is directly opposed to the pro-

visions of the Act of February 13, 1893, 27 Stat., 455, c. 105, entitled "An act relating to the navigation of vessels, bills of lading, and to certain obligations, duties and rights in connection with the carriage of property."

That act provides:

"SEC. 2. *That it shall not be lawful* for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, *to insert in any bill of lading* or shipping document *any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel*, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in anywise be lessened, weakened, or avoided.

"SEC. 3. *That if the owner of any vessel* transporting merchandise or property to or from any port in the United States of America *shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied*, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the managemert of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the skipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Applying the law as stated in these two sections, it is clear that the dressed meat clause, if not invalid entirely, does not wipe out the warranty completely and render the ship liable only upon proof of negligence by the owner of the cargo, as held in the courts below; it simply permits the ship owner to relieve himself (so far as concerns conditions at the commencement of the voyage) from liability for loss resulting from *latent defects*, upon proof by him that he has exercised due diligence to make the vessel and its equipment fit. There still remains a warranty that the ship owner shall exercise due diligence to create initial fitness, and therefore as this court said in *International Navigation Company* v. *Farr & Bailey Mfg. Co.*, 181 U. S., 218, the burden is upon the ship owner to show that he has used the required degree of diligence and not that which would be impossible; *i. e.*. that the owner of cargo shall prove that the ship owner did not exercise due diligence.

II.

The Harter Act applies to bills of lading issued for fresh meat.

There is no discussion of the law relating to this question in either the opinion of the District Court or of the Circuit Court of Appeals. There is a mere statement of conclusion only, that the ship was responsible, under the "dressed meat clause" only upon proof of negligenee.

In view of the absence of a discussion of the law it is impossible to state upon the ground upon which this finding is based, but as the provisions of the Harter Act are so clear, it may be that the

Court below was of the opinion that the Harter Act was not applicable to a contract for the carriage of fresh meat.

That view seems to have been taken by Judge THOMAS of the Eastern District of New York, in the *Prussia* 88 Fed., 531.

By reference to the decision in that case, it appears that Judge THOMAS deemed the furnishing of the cold storage compartments, for the carriage of fresh meat, a mere collateral undertaking, independent entirely of the obligation of a carrier and therefore the rights and duties of the parties were not governed by the law applicable to carriers, but were to be determined according to the law which would apply to the business of cold storage on land.

He says (p. 53[illegible]:—

> "This contract is quite collateral to the obligation of a common carrier, and hence may impose such full or qualified obligations upon the bailee as the parties to it determine."

That view, however, was not accepted by the Circuit Court of Appeals, (93 Fed. 837.) It is there said:

> "We conclude that the damage sued for arose in consequence of a latent defect in the refrigerating machinery, that due diligence was exercised by the owner of the steamship to provide suitable and perfect refrigerating machinery, and that by the terms of the Harter Act, as well as irrespective of that act, it is lawful for a vessel owner, who has exercised due diligence, in that behalf, to stipulate for exemption from liability arising from such a defect."

The conclusion of the Circuit Court of Appeals in the present case is the only guide to the reasons

upon which the decision is based, and in view of the clear and contrary provisions of the Harter Act, it must be assumed that the Court below, like the District Court in the *Prussia* case, was of the opinion that the Harter Act did no apply to contracts for the carriage of fresh meat.

It is unnecessary to point out the far reaching effect of such a decision. The equipment of modern ocean steamships has developed according to the necessities of modern commerce, and a great portion of the cargoes now carried upon trans-Atlantic steamers are of such a character that special facilities and appliances, in addition to those ordinarily provided by carriers, are necessary for safe transportation. Two instances will suffice to show the extent of this traffic. It has been but a short time since the newspapers announced the shipment of gold bullion of a value of $7,500,000 on the steamship *Kron Prinz Wilhelm*, and thousands of cattle are carried from the Atlantic seaports weekly. For the safe carriage of the bullion a special bullion room is necessary, and for the carriage of live cattle special fittings are required.

There never has been any question as to the duty of steamships in these cases. The law has always been understood to be that there is a warranty of the fitness of the vessel in all respects to carry the cargo received.

In *Queensland National Bank* v. *Peninsular and Oriental Steam Navigation Co.* (1898), 567, certain bullion was shipped upon the steamship *Oceana*, and it was held that there was an implied warranty that the bullion room was so constructed as to be reasonably fit to resist thieves.

In *Tattersall* v. *National Steamship Co.*, L.R. 12, C. B. Div. 297, the same rule was applied to a contract to carry cattle, and it was held that there was a warranty of the fit condition of the ship to carry them. The cattle became affected by a foot and mouth disease, which was occasioned by the negligence of the ship's servants in not cleansing the ship before receiving the cattle on board, and it was held that the ship owners were liable for the loss, although the bill of lading provided that the steamship company should not be "in any wise responsible either for the escape of the cattle from the steamer, or for accidents, disease or mortality," etc.

If the law, as stated by the courts below is correct, it applies not only to shipments of fresh meat, but to bullion, cattle and every commodity whatever whose safe carriage demands any special appliances not found in the sailing ships of a century ago.

Traffic of this character was of a large volume at the time of the enactment of the Harter Act in 1892, and it can not be presumed that Congress legislated in ignorance of it. It must be assumed that the intention of Congress was to govern the obligations of carriers of property at sea, and that it legislated with reference to all of the provisions of the contract of carriage and not to a part of it only.

Otherwise, it must be held that the obligation of the carrier may be determined by the character of the property; that as to coal stowed in the hold the carrier would be compelled, in case of loss, to prove that he had exercised due diligence to make the ship in all respects seaworthy,

but as to bullion, carried in the bullion room, or fresh meat stowed in the meat compartment, the unfortunate cargo owner, who sustained a loss, would be compelled to prove affirmatively that the ship owner was guilty of negligence.

III.

The Burden of Proof.

It is submitted that not only have the courts below erred as to the proper construction of the "dressed meat clause," but, that they have fallen into another error which is equally dangerous in its effect.

In delivering the opinion in *International Navigation Co.* v. *Farr & Bailey Manufacturing Company*, 181 U. S., 218, Mr. Chief Justice FULLER, says:

> "We repeat that even if the loss occurred through the fault or error in management, the exemption cannot be availed of unless the vessel was seaworthy when she sailed or due diligence to make her so had been exercised and *it is for the owner to establish the existence of one or of the other of these conditions.*"

It is asserted in the opinions of the courts below that under the "dressed meat clause" the ship is responsible for negligence only, *and that the burden of proof was upon the owner of the cargo to show negligence.* Such a rule of law would practically nullify the provisions of the Harter Act, as the information is always in the possession of the carrier.

That rule would permit the carrier to escape liability in every instance by following the course of the ship owner here, *i. e.*, giving no explanation whatever.

In the case of the *Prussia*, *supra*, the steamship company affirmatively established that the accident was due to a latent defect, and that it had used due diligence. In the present case there is not a word of testimony to show that the unfit condition of the machinery was caused by a latent defect.

There has been no attempt here to explain the manifest unfitness of the machinery at the time the cargo was received on board. The engineers being examined abroad, under a commission, (although there was ample opportunity to examine them in this country), evaded all questions on that point, and they also testified that they did not even know the cause of the accidents after the voyage commenced.

IV.

Inspection.

In conclusion, the attention of the court is directed to a point of much practical importance, that is, the finding of the court below as to what constitutes an inspection. It is said in the opinion of the District Court (Rec. p. 209):

> "Shortly before the voyage in question, it (the refrigerating machinery) had been inspected by a competent official, and was apparently in good order."

We are unable to state whether the court meant by this that there had been an exercise of "due diligence," as required by the Harter Act, or not, as the question is not referred to in the opinion.

Now it is true, that what constitutes a proper "inspection" is a mixed question of law and fact, like that which is sufficient to constitute negligence.

But as certain acts are so clear, as to permit a court to say as a matter of law, that they constitute negligence, the facts in certain cases may be so clear as to permit a court to say as a matter of law, whether they show a proper inspection.

The law is thus stated by Mr. Chief Justice FULLER, when he said in the *Edwin I. Morrison*, 153 U. S., at 215,

> "In relying upon *external appearances in place of known tests*, the respondents took the risk of their inability to satisfactorily prove the safety of the cap and plate if loss occurred through their displacement."

And it is submitted that in this case the error of the Court below is so glaring, that as a matter of law, it ought to be said that no proper inspection was made.

The alleged inspection was made by one McKernan, superintendent of the repair shops of the International Company, and *according to his own testimony it was not his duty to make an inspection*, but that duty was imposed upon Mr. Doran, superintending engineer, or his assistant, neither of whom testify as to any examination.

The testimony upon which the alleged inspection is based, is as follows:

> "*Q.* How long before the sailing had you inspected it?
>
> *A.* Do you mean from the outside?
>
> *Q.* Yes, sir.
>
> *A.* About half an hour before she sailed.
>
> *Q.* Was there any leak in the bonnet?
>
> *A.* No, sir.
>
> *Q.* Would you have known or could you have known of it if it had been?

A. Yes, sir.

Q. How?

A. By the smell.

Q. Was there anything apparently wrong with the pump or piston?

A. Nothing at all." (Record, p. 137.)

* * * *

"*Q*. What time did the "Southwark" sail on that morning, do you remember?

A. I could not tell you the exact time; it was in the neighborhood of eleven o'clock.

Q. What time were you in the refrigerating room?

A. About half an hour previous to that time.

Q. How do you fix the time?

A. Do you mean 11 o'clock?

Q. I mean the time you were in the refrigerating room.

A. Because I was there looking after it. I left the engine room, went around everything, the boilers and engines, and came up on the top platform where the refrigerators are; *went in and looked as I always did, and always do yet, I looked in there*." (Rec. p. 136.)

This is all the testimony upon which the allegation of an inspection is based. At the utmost, it shows only mere ordinary observation of machinery in motion. In fact, the witness' evidence practically shows no more than that the bonnet of the condenser was not then leaking, because no pungent odor of escaping ammonia gas was noticeable. Unquestionably the engine, the motive power, was working, and the witness saw that alone, but he did not give the slightest attention to the refrigerating machinery or discover that for some reason, it was not then and had not been producing cold. The temperature of the meat compartment was then

40° and the temperature of the brine, instead of being 20° was about 40°. He did not know or discover these facts because it was not his duty to make any examination of the manner in which the machinery was working.

There was no evidence of the slightest examination of the various temperatures and pressures by this witness. If he had made an examination of them he undoubtedly would have discovered, that which the log entries show, viz., that the machinery was not working properly, that it was not producing cold, and that the temperature of the air in the compartment and of the brine—the cooling agent—was so excessive as to endanger the meat, at once, in the summer weather then prevailing.

The sufficiency of the alleged inspection must be determined by the result and if—as appears—the witness did not so examine existing conditions, as to discover the excessive temperature and unfitness of the machinery, it is indisputable that his examination was not in any sense an "inspection."

The difference between the degree of diligence to be exercised, under the ruling of the court below, and that required by other courts, is well illustrated by the decision of Judge BROWN in the *Phœnicia*, 90 Fed., 117. Cargo was damaged by seawater entering through a leaky port. It appears that at Hamburg the outer blind was tried to see if it would go in or out, the glass cover and inner cover were screwed up tight. It was held that this was not a proper inspection as it would not show a leak—and that having failed to apply either the "chalk" or "water" tests, which would have showed the leaky condition of the port, the ship was liable.

The practical test of the sufficiency of the inspection appears, under the decisions of this court, to be the character of the defect. If latent, the inspection is presumed to be sufficient, but if not latent, it ought to be revealed by a proper examination.

V.

In view of the large amount of the transatlantic traffic in fresh meat, cattle, bullion etc., it is unnecessary to call the attention of the Court to the importance of the questions involved in this case and the necessity for a decision of this Court to clear up what appears to be difference in ruling between the decision of the Circuit Court of Appeals of the Second Circuit in the *Prussia* case and of the Court of Appeals in the Third Circuit, as to the effect of the Harter Act upon these "dressed meat clauses" and the difference upon an equally vital question, *i. e.*, as to the character of inspection required to constitute an exercise of due diligence.

But aside from any such conflicts with the decision in the *Prussia*, it is submitted that the decree of the Court below ought to be corrected because it is erroneous in the following particulars:

1. The finding that under the "dressed meat clause" the ship was liable only for negligence, is in direct conflict with the provisions of the Harter Act.

2. If the Court below meant that the Harter Act did not apply to the contract of carriage of fresh meat, that finding is erroneous as the provisions of the act apply to every clause of a bill of lading issued by an ocean carrier.

3. The finding that the burden of proof of negligence was upon the libellant is opposed to the law as stated by this Court.

4. Because it has never before and ought not now to be held that the mere superficial observation of machinery in motion, by one who had no duty of examination, is a proper inspection of the machinery and especially where patent unfitness is not discovered.

It is therefore submitted that a writ of *certiorari* ought to issue.

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